Calendar No. 209

99TH CONGRESS
1st Session

SENATE

REPORT
99-92

PROVIDING THAT EACH ITEM OF ANY GENERAL OR SPECIAL APPROPRIATION BILL AND ANY BILL OR JOINT RESOLUTION MAKING SUPPLEMENTAL, DEFICIENCY, OR CONTINUING APPROPRIATIONS THAT IS AGREED TO BY BOTH HOUSES OF THE CONGRESS IN THE SAME FORM SHALL BE ENROLLED AS A SEPARATE BILL OR JOINT RESOLUTION FOR PRESENTATION TO THE PRESIDENT

JUNE 27 (legislative day, JUNE 26), 1985.—Ordered to be printed

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Mr. MATHIAS, from the Committee on Rules and Administration, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 43]

The Committee on Rules and Administration, to which was referred the bill (S. 43) to provide that each item of any general or special appropriation bill and any bill on joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President, having considered the same, reports unfavorably thereon without amendment and recommends that the bill do not pass.

COMMITTEE ACTION

The Rules and Administration Committee held a mark-up session on Thursday, June 20, 1985, and voted to report S. 43 unfavorably, without amendments, and with a written report.

Chairman Mathias opened the mark-up session by stating:

> As the Committee begins its consideration of S. 43, Senator Mattingly's line item veto proposal, I think it prudent to take a few minutes to reflect on the hearings we held in May on this far-reaching measure. I find the transfer of power from the Congress to the President, which would

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occur if S. 43 were enacted and implemented, a disturbing proposition. I doubt the constitutionality of this bill, and I am deeply concerned about those provisions that would further centralize power in the Executive branch, specifically in the Office of Management and Budget. The distinguished Chairman of the Appropriations Committee, Senator Hatfield, and I had an exchange on this issue during the first day's hearing and I would like to quote from the hearing transcript, especially for those of you who could not be present:

> The CHAIRMAN [Mathias]. The Senator [Hatfield] refers to the constitutional process. If the Congress is wrong—and we frequently are—there is accountability. If we vote for too much expenditure, we answer for that at the next election. Who in the Senator's experience is likely to be accountable for the advice that is given to the President on a line-item veto?
>
> Senator HATFIELD. None of them are accountable in terms of the public.
>
> The CHAIRMAN. Mr. Stockman?
>
> Senator HATFIELD. No, he's not elected.
>
> The CHAIRMAN. Any of his assistants?
>
> Senator HATFIELD. None.
>
> The CHAIRMAN. As a practical matter, aren't these the people who will be highly influential in that decision?
>
> Senator HATFIELD. Correct.
>
> The CHAIRMAN. So we are really moving away from a system of representative government.
>
> Senator HATFIELD. We are centralizing more and more political power in the hands of the Chief Executive, in the executive branch of government.

Chairman Mathias, continuing his mark-up session opening statement, stated:

> President Reagan and OMB have expressed strong support for the line item veto power. David Stockman was asked on Monday of this week, at the American Enterprise Institute (AEI) conference on the Congressional Budget and Impoundment Control Act, what the line item veto's effect on the Federal deficit would be. In a burst of candor, David Stockman replied: "marginal, if at all." Mr. Stockman amplified his answer by saying: "Line item veto is about political power and political control. It can be used for lots of things. It would be great for the Director of OMB." This is, indeed, my and Senator Hatfield's fear.
>
> I also was struck by the pithiness of the remark by this Committee's distinguished ranking minority member, Senator Ford, as he reminded us of the tremendous power the President already has in the Constitutionally prescribed veto power. Speaking to Senator Evans, Senator Ford

noted "Well, Senator, any President who has a wet pen and one-third of the votes can do anything he wants to."

On the question of "let the Courts decide the constitutionality of S. 43," we should be reminded of the oath of office we all take as Senators "to uphold the Constitution." Regardless of the Supreme Court being the final arbiter, this oath requires us to make our own judgments on the constitutionality of any measure or amendment we vote on.

After further discussion, the Committee acted on two motions regarding S. 43. The first motion, by Senator Garn, to report S. 43 favorably, failed by voice vote. (Senator Dole noted that he had specific proxies from three absent Senators to be recorded as voting in favor of Senator Garn's motion.) The second motion, by Senator Ford, to report S. 43 unfavorably, passsed by a record vote of 11–0, with Senator DeConcini recorded by proxy in favor of Senator Ford's motion.

BACKGROUND

Senate Bill 43, which provides that each item of any general or special appropriation bill and any bill or joint resolution making supplemental deficiency, or continuing appropriations that is agreed to by both Houses of Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President, was referred to the Rules and Administration Committee on January 3, 1985. This measure, which was introduced on January 3, 1985, by Senator Mattingly, is co-sponsored by 46 Senators, six of whom, Senators McClure, Helms, Warner, Dole, Stevens, and Garn, are members of the Rules and Administration Committee.

The Committee held two days of hearings on this measure (May 14 and May 20, 1985) receiving testimony in favor of the measure from Senator Mattingly and Senator Evans and testimony in opposition to the bill from Senator Hatfield and a panel of experts (Dr. Louis Fisher, Specialist in American National Government in the Congressional Research Service; Dr. Allen Schick, Professor of Public Policy at the University of Maryland as a visiting fellow of the American Enterprise Institute; and Dr. Norman Ornstein, AEI Resident Scholar.) Senators Mathias, Ford, and Inouye raised questions, and spoke in opposition to S. 43, when questioning the various witnesses.

Statements in favor of the bill were received from Senator Thurmond, Senator Dole, Howard Jarvis (American Tax Reduction Movement), John C. Datt on behalf of the American Farm Bureau Federation, 13 groups and associations led by the U.S. Chamber of Commerce, and Professor Judith Best of the State University of New York at Cortland. Statements for the Record in opposition to S. 43 were received from Common Cause, the AFL/CIO Executive Council, and the National Council of Conservation Districts. Also received for the record was a statement from Johnny H. Killian, CRS Specialist in American Public Law, who concluded that the courts would decide the constitutionality of S. 43, if enacted and

implemented by the Congress, on the basis of how much power shifted from Congress to the President.

TESTIMONY AT HEARINGS

Senator Dole's statement for the hearing record summarizes the goals of those favoring the line item veto:

> [In effect] the Mattingly proposal allows the President to veto part of an appropriations bill and sign the remainder of the bill. This change would restore some of the original significance of the veto power under the constitution, should help control federal spending, and would reduce the incentive to attach special-interest spending provisions to appropriations bills.

Senator Mattingly further asserted that the line item veto was worth trying for two years, as specified in S. 43, and if it only saved one million dollars, it would be worth the effort. Senator Thurmond noted that governors in 43 states exercise a line item veto and Senator Evans stressed that for proponents of S. 43, the line item veto is viewed "as an important first step toward fiscal responsibility."

Senator Hatfield argued at the first day of hearings against both the procedure of S. 43 and the rationale of its proponents. Observing that the Mattingly proposal would only effect a small fraction of the federal budget, a fraction which has actually been the only declining portion of the federal budget in recent years, Senator Hatfield stated:

> It baffles me that we are considering a proposal that seeks to control the only portion of the budget we have been able to control—not only control, but reduce—in recent years. This is not the path to meaningful deficit reduction. Indeed, we could eliminate all non-defense domestic discretionary appropriation items and the deficit would still exceed $100 billion in fiscal year 1986.

Commenting on the 43 states whose governors have the line item veto power, Senator Hatfield quoted from the February 1985 Annual Report of the President's Council of Economic Advisors:

> Approval of a line item veto may not have a substantial effect on total federal expenditure. The experience of the states indicates that per capita spending is somewhat higher in states where the governor has the authority for line item veto, even when corrected for the major conditions that affect the distribution of spending among states.

Senator Hatfield's conclusion was that S. 43

> Has little to do with spending reduction. It has everything to do with the balance of power in our government. This proposal represents a significant grant of power and passing of responsibility to the Chief Executive at the expense of the legislative branch, and there are no sound reasons why this shift in power should occur.

Senator Mathias, in his opening statement at the May 14th hearing, stated:

> Speaking as a Senator and not as a legal scholar, I submit that S. 43 would dramatically alter the constitutionally mandated relationship of the Congress to the Executive.

Observing that "the unstated purpose of the sponsors of S. 43 is to reduce the federal deficit, although this aspiration is nowhere in the text of the measure," Senator Mathias posed several questions for the proponents of S. 43:

> 1. How will this measure reduce the Federal deficit when it covers only 11 percent of non-defense discretionary spending? The budget will never be controlled by exempting 89 percent of federal spending from the control mechanism, whatever that mechanism may be.
> 2. Would you support the application of this so-called "line item veto" mechanism to social security and other trust fund measures? What about the tax code? Shall we send to the President a separate bill for each item in a tax package?
> 3. What would happen to the receipts and expenditure resolutions required by the Congressional Budget and Impoundment Control Act if the provisions of S. 43 were enacted? How would anyone in Congress know what Federal spending was going to be for a given fiscal year?

Senator Mathias continued with a reminder,

> Of the outrage of Senators and Representatives only 10 or 12 years ago when the Executive Branch began refusing to spend funds authorized by Federal Statute. Now we are proposing to give away far more power than was exercised in the impoundments of the President about which we complained so bitterly.

Chairman Mathias concluded by saying:

> I would add one more observation before we begin this morning. The President has asserted that he wants this line item veto power in order to reduce the deficit and balance the budget. Why, then, doesn't the President simply send to the Congress a balanced budget? Why does the President send to the Congress budgets that are over 200 billion dollars in the red? These deficits only compound our economic troubles and move many Americans to seek mindless budget cuts and to advocate abdication of the social responsibilities of this great nation.

Senator Mathias' statement which opened the Rules Committee's May 20th hearing reflected on Dr. Allen Schick's prepared remarks from the hearing held on May 14th.

> First, S. 43 flies in the face of Congress' long standing tradition of appropriating funds in large budget items. Dr. Schick says, and I quote: "Although the Federal budget is divided into more than 1100 accounts, the 50 largest ac-

counts add up to more than 80 percent of total outlays." Thus, he says, "current practices offer meager support for the proposition that the item veto would enable the President to pluck high spending items from appropriations bills."

Second, line item veto in practice might lead to more rather than less spending. Over the past decade, there has been a steady increase in the number of general provisions attached to appropriation bills in an effort to limit the use of appropriated funds by executive agencies. Dr. Schick says: "It is ironic that these general provisions rather than spending levels might turn out to be the principal targets of the item veto."

Third, if enacted, the line item veto would simply strengthen the hand of the President over the will of the Congress. Dr. Schick says: "When Congress and the President disagreed as to spending priorities, the President would have a better chance of imposing his preferences." I would add that S. 43 would also strengthen the House of Representatives at the expense of the Senate since, traditionally (and some would say constitutionally, as well), appropriations measures originate in the House. Consequently, the House of Representatives would determine how these measures would be broken apart into items. Great power to the President: more power to the Speaker! And all resulting in diminished authority of the United States Senate.

Dr. Fisher, Specialist in American National Government in the Congressional Research Service, called attention to the possibility of a President vetoing a condition, proviso, or qualification in an appropriation bills. Through such actions the President would convert a conditional appropriation to an unconditional appropriation. This issue occurs frequently in the states, producing conflicts between legislatures and governors and generating a substantial amount of litigation and unresolved legal questions. Dr. Fisher also pointed to the difference between appropriations bills enacted by state legislatures and by Congress. State bills have a high degree of detail, allowing the governor to strike individual projects and programs. At the federal level, "items" are generally found only in committee reports or agency documents, not in appropriations bills. He also discussed the difficulty of predicting whether S. 43 would produce economies or savings. It is possible that some savings achieved by the item veto would simply neutralize spending added to bills because the President now possessed item veto authority. In that sense, the availability of an item veto might lead to more legislative irresponsibility. Moreover, it would give the White House an additional tool to influence legislators, possibly building support for costly administration programs. Dr. Fisher ended his testimony by questioning whether the procedures contemplated by S. 43 met the constitutional requirement that every bill presented to the President shall have passed the House of Representatives and the Senate.

Dr. Ornstein, Resident Scholar at the American Enterprise Institute, predicted that S. 43 would represent "an enormous shift of power" to the President contrary to the spirit of the Constitution and the intentions of the Founding Fathers. He also challenged the belief that the President is necessarily a force for fiscal restraint while Congress prefers higher spending. A broad survey of American history, he suggests, demonstrates that both branches have their own agendas for spending and a different set of program priorities. Instead of spending more for "pork-barrel" projects, Congress spends less. The share of the budget allocated for discretionary domestic spending has declined over the years, in large part because of conscious decisions made by Congress. Dr. Ornstein doubted that the delegation of item veto authority to the President would result in less spending. He suggested that it might lead to more. The President could threaten Members of Congress with the loss of their favored programs unless they supported the administration's goals. Through this type of negotiation and White house lobbying, the net result might be more spending to satisfy the priorities of the President and Congress. Because of this complicated and informal system of Presidential-Congressional liaison, there would be little basis for determining after the two-year trial period whether S. 43 had served the purposes of fiscal constraint. It would be difficult to assess the benefits of the experience and know whether to extend the procedures in S. 43 for an additional period of time.

Among other points raised by Senator Mathias during the hearings were: the nature of recent continuing appropriations measure such as the one containing the revision of the entire criminal code; the present availability to the President of the rescission power; and the dangers of further centralizing power in the executive branch, especially within the Office of Management and Budget.

Senator Ford raised several additional issues during the two days of hearings; he expressed grave doubts about the wisdom of substituting the President's political judgment for that of the Congress. Senator Ford further observed that

> There is no way that the President can be out of trouble under line item veto, in my opinion, without creating political furor unless we have a balanced budget submitted, and if we want a balanced budget and this is the way, we are getting form ahead of substance.

Senator Ford's conclusion was:

> I think what is the issue here is whether Congress is going to do its job. That, I think, is the real issue, to make the total and tough decisions to reduce the deficit. We are getting close to abdicating under this particular bill our constitutionally mandated responsibilities.

ISSUES RAISED BY S. 43

I. Constitutional issue

The constitutional question is the most important issue raised by S. 43. The founding fathers skillfully distributed powers among the three branches of government. The powers of lawmaking, confirma-

tion of officers of the United States, and that of advise and consent to treaties are among the important powers assigned to the Congress, the first branch of our federal government. S. 43 fails two immediate tests of constitutionality, the first being the procedural test, the second being the test of the balance of power between the legislative and executive branches.

The first, the procedural test, must be considered in light of the recent Chadha decision concerning the legislative veto; in striking down the legislative veto, the Supreme Court ruled that Constitutional procedures for lawmaking must be strictly adhered to. The novel approach of S. 43 would empower the Enrolling Clerk of the body in which a respective appropriations measure originated to "dissect" the bill or joint resolution paragraph by paragraph, section by section, and then create bills and joint resolutions for each of these items, adding to them fictitious enacting clauses, and sending the composite products to the President as though these "items" were legislative measures agreed to by both the House and Senate in the format in which they are presented. Were the procedural strictures of Chadha applied to this consequence of an enacted and implemented S. 43, its constitutionality would fall on procedural grounds alone.

The second, and more serious test, is that of the intended balance of power between the legislative and executive branches of the federal government. As noted in Chairman Mathias' opening statement at the Rules Committee mark-up of S. 43, this measure is about political power, not budget deficits or fiscal responsibility. Ironically, the view of the CRS Senior Specialist in American Public Law, Johnny H. Killian, is that S. 43's substantive constitutionality would rise or fall depending on the degree to which it is effectively implemented. In other words, the constitutionality of S. 43 would depend, in this context, on the actual amount of power shifted from the legislative to the executive branch.

A third, and more general philosophical question, is that of the power of the purse. Here, British constitutional history, summarized below, affords us an historic background to the work of the American constitutional framers.

The British Sovereign's Veto Power ("The Royal Assent")

The Royal Assent, an ancient tradition and an integral part of the United Kingdom's unwritten constitution, is the final act in the legislative process by which bills before Parliament are enacted into law. Theoretically conferring the formidable power of an absolute veto on the sovereign, a power which was regularly exercised until the 17th century, the Royal Assent has since evolved into a legal formality.

Here it is important to note that at NO time during the 770 years since Magna Carta has the British crown ever had the "item veto authority." It is also important to remember that the power of the purse, which began immediately following the King's assent to Magna Carta, provided

an early and vital foundation for the growth of parliamentary authority.

Any American Presidency can advance arguments for more and greater veto power over the legislative branch of our Federal government. The present administration wants the power of an item veto. We should remember that once this power is obtained by any administration, the temptation to use—and to abuse such a power—would be overwhelming.

If, in fact, a majority of Americans wish to consider such a major alteration in our political power structure as envisioned by S. 43, the proper forum for that debate is a proposed constitutional amendment, not a bill or joint resolution.

II. Further centralization of power in OMB

Item veto power would further the centralization of power within the Office of Management and Budget. Presidents have had the service of a budget bureau since 1921. In 1970 the Budget Bureau was reorganized to form the OMB and since that time there has been a steady accumulation of new powers and duties within the OMB. The responsibility to prepare a national budget has been augmented by controls over agency personnel ceilings, procurement policy, and paperwork. On many occasions these powers have been used to alter the substance of legislative policy. OMB's powers were further strengthened in 1981 when President Reagan issued Executive Order 12291, providing a centralized mechanism within the OMB to direct and control agency rulemaking activities. By subjecting agency rules to cost-benefit analysis, the OMB has been able to delay agency rules or alter their content. This procedure was reinforced in 1985 with the issuance of Executive Order 12498.

III. Rescission and deferral powers of the President

As Senator Mattingly testified before the Committee, S. 43 does not provide item veto authority. Rather, it provides "section and paragraph veto authority." Under his proposal, a President could veto only an unnumbered paragraph or a numbered section. In neither case are "items" present. Particular projects or program items are usually identified only in the committee reports or agency documents that justify budget requests.

In contrast, Presidents can now reach items by invoking the procedures of the Impoundment Control Act of 1974. If Presidents want to delay the obligation of budget authority, they may submit to Congress a proposal for a "deferral." The deferral remains effective unless one House disapproves. As a result of the Supreme Court decision in *INS* v. *Chadha* (1983), the one-House veto and other forms of the legislative veto are now unconstitutional. To disapprove a deferral, Congress would have to use a bill or joint resolution that is presented to the President for his signature or veto.

The Impoundment Control Act also authorizes the President to submit to Congress a proposal to rescind (terminate) enacted budget authority. Unless both Houses support the rescission request within 45 days of continuous session, the funds must be released for obligation. Under this authority, President Reagan sub-

mitted to Congress large sums for rescission in fiscal 1981 and 1982 but much smaller sums since then (Table I).

TABLE I.—RESCISSIONS AND DEFERRALS, FISCAL YEARS 1975–85

[Dollars in thousands]

Fiscal year	Rescissions				
	Number	Amount proposed	Amount approved	Amount rescinded (percent)	Proposals approved (wholly or in part) (percent)
1975	91	$3,328,500	$391,295	12	43
1976 [1]	50	3,608,363	138,331	4	14
1977	21	1,835,602	1,271,040	69	48
1978	8	644,055	55,255	9	38
1979	11	908,692	723,609	80	80
1980	59	1,618,061	778,127	48	58
1981	208	16,204,936	14,509,878	90	67
1982	34	9,484,941	5,974,966	63	21
1983	21	1,569,015	0	0	0
1984	12	666,411	58,000	9	17
1985	242	1,843,315	0	[2] 0	0

Fiscal year	Deferrals					
	Number	Amount proposed	Amount disapproved	Number of deferrals disapproved	Amount disapproved (percent)	Deferrals disapproved (percent)
1975	159	$24,574,236	$9,318,217	16	38	10
1976 [1]	119	9,209,780	393,081	[3] 24	4	20
1977	68	6,831,194	25,600	3	.4	4
1978	66	4,910,114	69,531	6	1	9
1979	70	4,696,056	13,852	2	.3	3
1980	73	9,846,235	3,663,448	2	37	3
1981	258	7,535,493	367,359	15	5	13
1982	258	7,562,078	386,347	15	5	6
1983	86	9,957,186	4,119,590	16	41	19
1984	59	4,443,025	2,050	1	0	2
1985	71	14,872,622	0	0	0	0

[1] Fiscal 1976 data include the transition quarter. A proposal to rescind or defer funds in both fiscal 1976 and the transition quarter is counted as a single proposal.
[2] $37,402,000 remained before Congress for approval.
[3] Two fiscal 1976 deferrals that were disapproved by both the House and the Senate are counted here once.

Note: Data for fiscal year 1984 as of May 7, 1984.

Source: Vital Statistics on Congress, 1984–1985 Edition (American Enterprise Institute, 1984); tabulated from House Appropriations Committee data. Fiscal 1985 data taken from H. Doc. No. 99–77 (June 10, 1985).

Table II.—Budget deficits submitted by Carter and Reagan

	Billions
By Carter:	
Fiscal year:	
1978	[1] $57.75
1979	60.0
1980	29.0
1981	15.8
By Reagan:	
Fiscal year:	
1982	[2] 45.0
1983	91.5
1984	188.8
1985	180.4
1986	180.0

[1] February 1977 revisions to Ford's final budget.
[2] Feb. 18, 1981, revisions to Carter's final budget.

IV. Experience of the States.

The fact that 43 governors are authorized to veto items in bills presented to them is not, by itself, persuasive evidence that the same authority should be vested in the President. First, the governors use that power in the context of a balanced budget, required by 49 states.

The Federal budget, unlike state budgets, is used for broad purposes of economic stability and national security, either of which could require the setting aside of a balanced budget. Second, appropriations bills in the states are highly itemized to accommodate the governor's item veto power. Appropriations bills passed by Congress are in the form of lump sums to permit agencies and departments greater latitude in administering their budgets over the course of a fiscal year. Third, state constitutions are much more restrictive on legislatures. Whereas the U.S. Constitution provides very few limitations on the use of the spending power, state constitutions place limits on borrowing, prohibit certain private or local laws, and contain a number of other proscriptions on what may be legislated. State constitutions also prevent the addition of substantive legislation on appropriations bills and adopt the policy of "one subject per bill" to protect the governor's item veto authority. In contrast, the U.S. Constitution does not try to regulate the style or form of appropriations, nor does it attempt to distinguish between the authorization and appropriation process. Such matters are left to House and Senate rules or statutory law.

V. Budget Coverage of S. 43.

The total amount of current Federal spending which is relatively controllable is 26.2 percent. Of that amount, 15.2 is defense spending, and 11.0 is non-defense. The present administration wants more, not less, defense spending. Thus, exercise of a line item veto by the current President, as envisioned by S. 43, would affect only this remaining 11 percent—which in dollar terms (not adjusted for offsetting receipts) is 128 billion dollars, only about half the current estimate of the Federal deficit for one fiscal year.

The 11 percent of relatively controllable non-defense spending comprises 846 budget accounts. Of these, the largest 12 make up 50%—64 billions—of the 128 billion dollars for all accounts in this category. And these 12 accounts run the gamut from trust fund activities to social programs to NASA. On which of these 12 do we wish to offer the President the opportunity to exercise a line item veto?

The 12 accounts are:

Payments to the health care funds (19.350 billions);
Food Stamp Program (11.672 billions);
Veterans' Medical Care (7.903 billions);
Payments to Social Security Trust Funds (5.762 billions);
Foreign Military Sales Credit (2.888 billions);
Liquidation of SBA Loan Portfolio (2.651 billions);
Social Services Block Grant (2.538 billions);

Highway Trust Fund payment to FHA (2.389 billions);
Rural Housing Insurance Fund (2.280 billions);
NASA (2.231 billions);
REA direct loans (2.222 billions);
Trust Fund share of FAA operations (2.043 billions).]

This totals $63,929,000,000—64 billion dollars.

In his January, 1985, budget submission to the Congress, the President requested only THREE RESCISSIONS for this entire set of 12 accounts—one rescission in each of the first three accounts. These are:

0.73 billions for payments to the health care funds;
0.009 billions for the Food Stamp Program;
0.010 billions for the Veterans' Medical Care;

This totals less than one billion dollars (755 millions), or only 1.2 percent of 64 billions dollars!

TABLE III.—RELATIVELY CONTROLLABLE NONDEFENSE OUTLAYS IN RELATION TO OTHER OUTLAYS AND TO TOTAL OUTLAYS

[Unadjusted for offsetting receipts]

[Dollars in millions]

	1984		1985		1986	
	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total
Outlays	$1,019.8	100.0	$1,142.3	100.0	$1,166.3	100.0
Uncontrollable, by program	583.6	57.2	653.0	57.2	673.9	57.8
Prior year obligations:						
Defense	79.5	7.8	91.3	8.0	109.2	9.4
Nondefense	67.9	6.7	76.2	6.7	78.2	6.7
Total, uncontrollable	731.0	71.7	820.5	71.8	861.3	73.8
Controllable:						
Defense	148.5	14.6	163.1	14.3	176.9	15.2
Nondefense	140.3	13.8	158.7	13.9	128.1	11.0
Total, controllable	288.8	28.3	321.8	28.2	305.0	26.2

Source: President Reagan's January 1985 budget recommendations.

VI. The Founding Fathers

It has been argued that the President needs an item veto because his general veto power has been eroded over the years by omnibus appropriation bills, riders, on appropriations bills, and the use of continuing resolutions passed at the beginning of a fiscal year. It is also asserted that the early Congresses sent to the President appropriations bills that were highly itemized, whereas today the President receives lump-sum appropriations. However, even from the early decades of the Republic, it was recognized that it is impracticable for Congress to itemize appropriations bills. Moreover, the executive branch wants the latitude and discretion that comes with lumpsum funding. In addition, whatever the President has lost through omnibus bills and appropriations riders he has more than made up through his initiative in the legislative process, his issuance of Proclamations and Executive Orders that have the force of law, and the vast bureaucracy available to him in the departments, the White House, and the Office of Management and Budget to

lobby Congress for administration goals. If the Framers would be surprised by the nature of omnibus legislation today and the use of appropriations riders, so would they be stuck by the deep and pervasive involvement of the President in the legislative process. The item veto is not needed to restore the original notion of checks and balances. The President has more than enough tools to protect his office.

VII. A budget consensus versus individual items

The majority of the Committee took special note of Dr. Schick's observation concerning the consensus forest versus individual trees:

> In my view, the item veto is a political obstacle to effective budget control. Concentrating on discrete items might have been appropriate a century ago when spending was modest and most funds were allocated for the continuing operations of govcrnment. In the present situation, however, budget control depends on reaching agreement as to total spending and on a package of program and expenditure policies consistent with that total. The recent Senate package was passed only because many Members were willing to subordinate their preferences with respect to individual items to an overall budget policy.

COMMITTEE ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote in the Committee on Rules and Administration during its considertion of S. 43 is as follows: A motion proposed by Senator Garn to report the measure favorably, by voice vote, failed to carry. A motion proposed by Senator Ford to report the measure unfavorably, by rollcall vote: yeas, 12; nays, 0.

Yeas	Nays
Mr. Mathias	0
Mr. Dole	
Mr. Hatfield	
Mr. McClure	
Mr. Stevens	
Mr. Garn	
Mr. Ford	
Mr. Pell	
Mr. Byrd	
Mr. Inouye	
Mr. DeConcini[1]	
Mr. Simon	

[1] By proxy.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Rules and Administration does not consider that enactment of S. 43 would have any regulatory impact.

COST ESTIMATE

In compliance with paragraph 6(a) of rule XXVII of the Standing Rules of the Senate, the Committee on Rules and Administration does not consider that there would be additional costs as a result of enactment of Senate Bill 43.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee on Rules and Administration notes that no changes in existing law are made by the bill as reported.

ADDITIONAL VIEWS OF MR. DOLE, MR. WARNER, AND MR. GARN

The author of S. 43, Senator Mack Mattingly, has prepared an analysis of the arguments that have been made against the legislation. We support and adopt his view, which is submitted herewith, on our own behalf and for the benefit of our collleagues.

We strongly support S. 43. This legislation should be approved by the Congress. While we would have preferred that the bill be reported with a favorable recommendation, we voted in favor of a motion to report the measure unfavorably in order to give the full Senate a chance to consider a measure that holds great promise a tool with which to control Federal spending.

There is no doubt about the need to reduce Federal spending. Taxes as a percentage of gross national product (GNP) have remained relatively constant over the past 15 years. Spending, however, measured as a percentage of GNP, has grown from about 20 percent in 1970 to almost 25 percent in 1985. Soaring Federal expenditures have led to an enormous burden of debt that threatens to choke economic growth. It has never been more important to find new ways of controlling Federal spending.

S. 43 would give the President a form of line item veto authority over appropriation bills. We support its enactment because it represents an immediate and effective method to advance our shared goal of reducing Federal spending.

THE CONSTITUTIONAL QUESTION

We know that some Members are concerned about the constitutionality of this legislation. However, we recommend to our colleagues the analysis prepared by Mr. Johnny Killian, senior specialist of American constitutional law at the Congressional Research Service in the Library of Congress. That document, a copy of which we insert here for the record, points out the carefully limited approach taken by S. 43.

CONSTITUTIONAL QUESTIONS RAISED BY S. 43 IN ESTABLISHING ITEM VETO

This is in response to your request for a brief consideration of S. 43, 99th Congress, proposing to create the item veto by statute, by reference to the constitutional discussion in our report entitled "Constitutionality of Empowering Item Veto by Legislation," dated January 4, 1984.

The bill would achieve the item veto through direction to the officer of the originating legislative body to take any appropriations bill passed in the same form by both Houses and to divide it into separate bills conforming to the numbered sections or unnumbered paragraphs of the

original bill. These bills are then sent to the President who may sign or veto each separate bill as he wishes. Congress could override any veto as it currently does.

Without elaborating in any detail the discussion in the previous report, we can summarize the constitutional considerations as follows: Under the Constitution, the President must sign or veto bills coming to him from Congress, irrespective of the fact that any particular bill may contain provisions he favors and other provisions he does not favor. The President's veto power is an intrusion into the lawmaking function of Congress which the Constitution specifically provides for. Expansion of the President's power in this respect implicates the separation of powers doctrine, which is one of the bedrock principles of our constitutional governance. Whether that expansion would be unconstitutional is, of course, another question, requiring evaluation whether it would violate an express provision of the Constitution or, if not, whether it would be invalidated because of its disruption or potential disruption of the assigned functions of one or another branch.

"Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. . . . These provisions of Art. I are integral parts of the constitutional design for the separation of powers." *INS* v. *Chadha*, 103 S. Ct. 2764, 2781 (1983). The relevant sections of the Constitution require passage by both Houses of Congress of a bill in the same form, presentation to the President, and his signature or the enactment of the bill over his veto by the required majorities. Departure from these processes leading to a greater intermixture of functions as between the legislative and executive branches seems to raise a presumption that constitutional boundaries have been crossed. "It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.*, 2784.

Evident it would appear to be that simply to authorize the President to pick and choose among provisions of the same bill would be to contravene this procedure. In S. 43, however, a different tack is chosen. Separate bills drawn out of a single original bill are forwarded to the President. In this fashion, he may pick and choose. The formal provisions of the presentation clause would seem to be observed by this device. The question that would appear to be raised is whether the provisions setting forth Congress' role in lawmaking have been complied with. Both Houses have passed a single bill and this bill comprises the no-doubt numerous compromises within each House and between the two Houses; the resulting bill may be balanced and contain provisions accepted by some in return for acceptance of provisions they wish. This bill is then separated into

what may be artificial parts and transformed into separate bills as a ministerial act by an employee of one House. These bills are then sent to the President without ever being passed again by the two Houses. Does this process comport with Article I?

Of course, it is true that the Constitution does not mandate compromise in bills passed by Congress, it only makes compromise possible. And even under S. 43, Congress retains its ability to ensure that any compromises are kept inviolate from the President's veto. The officer dividing up the bill must make separate bills out of numbered sections and unnumbered paragraphs. Nothing would prevent Congress from protecting a compromise by placing two or more disparate provisions into the same section or paragraph.

But the more interesting question is whether Congress may comply with Article I through passage of a single bill and then direct its separation into a series of bills which Congress then does not again take up. Each House has the power under Article I, § 5, cl. 2, to "determine the Rules of its Proceedings," and in S. 43 this power is exercised in § 2(b) by deeming each enrolled bill to comply with clauses 2 and 3 of § 7. The bicameralism requisite, however, arises from § 1 of Article I, vesting legislative power in the two Houses. *INS* v. *Chadha, supra,* 2783. Therefore, the issue is a not insubstantial one, inasmuch as upon its resolution turns the answer to the question whether the President's power under the presentation clause is legally enhanced or whether the enlargement is simply a de facto one.

Because there is no judicial precedent and no known legislative precedent in the congressional context to apply to the fact situation, it is not possible to attempt any definitive resolution of this question. However, the resolution may lie in the observation that compliance with the bill if enacted and its effectuation is wholly within Congress' discretion. Congress in passing the original bill may combine into single sections any of a number of disparate parts and in fact it could enact a lengthy and complex measure in one numbered section or one unnumbered paragraph comprising the entire bill. Because Congress retains full control over the process, it would perhaps be excessive formalism to require that each separated bill be again passed by both Houses. While true, perhaps, to the letter of Article I, such a requirement would in fact by unnecessary to achieve what Article I necessitates in the process of lawmaking.

Not only must we be concerned, when considering separation of powers issues, with specific constitutional provisions which a governmental action may violate, but there are as well structural and "inherent" guaranties of separation. Thus, in *Myers* v. *United States,* 272 U.S. 52 (1926), the Court held unconstitutional a legislative limitation upon the President's power to remove officers of the executive branch, not because any specific provision of the Con-

stitution conferred on the President or denied to Congress the power of removal under the circumstances, but because the Court discerned in the nature of executive power the necessity of having removal authority. The Court has since distilled the doctrinal essence to be applied in the absence of a specific constitutional provision to be, first, whether the action of the moving branch threatens to prevent another "from accomplishing its constitutionally assigned functions," and, second, where there is a "potential for disruption" it must be determined "whether that impact is justified by the overriding need to promote objectives within the constitutional power" of the moving branch. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442–443 (1977); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753–754 (1982).

Here, it would appear to be evident that a successful conferral upon the President of the item veto would constitute an enlargement of presidential power and a diminution of congressional power, simply as a matter of fact. Whether this shift of power would constitute, in constitutional terms, a potential for prevention of the exercise by Congress of its constitutionally assigned functions would present a nice question. However, if the matter is analyzed in terms of the most probable operation of an enacted S. 43, rather than in terms of its formal provisions, it would appear to be unnecessary to reach that question. Again, the key would seem to lie in the observation that compliance with an enacted bill and its effectuation is wholly within Congress' discretion. As noted above, Congress could combine into one numbered section of a bill two or more disparate provisions. It can avoid the intended operation of S. 43 by ensuring that the President may not pick and choose among the items with which it is most concerned.

Of course, Congress may also put in differently numbered sections various items which it wishes to be enacted together and the President may choose to frustrate congressional wishes. In that event, the intent of S. 43 would be effectuated and the power shift would occur. But Congress could accomplish that very same shift by in fact passing separate bills containing the various provisions which it otherwise would put into the same bill. The power shift would occur, but would anyone suggest that Congress could not cause that power shift in this way? If the one would be valid, would not rejection of the other be adherence to pure formalism?

The key would seem to be that congressional discretion, congressional power, to bring about a particular result or to avoid a particular result is preserved.

To conclude, two questions are raised about S. 43 in terms of the Constitution. First, would the bill in operation violate the lawmaking procedure set out in Article I because the separated bills would not be passed again by both Houses? Bills that in fact were not passed through or-

dinary lawmaking would be sent to the President. While it is literally true that S. 43 would achieve this result, it is arguable that Congress' power to prescribe its own rules and its control over the features of the one original bill would militate against a finding that literal noncompliance effectuated a constitutional violation. Second, would enactment of S. 43 result in an unconstitutional shift of power between Congress and the President? While this shift might occur, the degree to which it would and the power to reverse the shift would continue to remain with Congress. In that fact would probably lie the basis to reject the argument as too formalistic.—John H. Killian, Senior Specialist, American Constitutional Law, Library of Congress.

We particularly note Mr. Killian's response to the question of whether enactment of S. 43 would result in an unconstitutional shift of power between Congress and the President. He states that "while this shift might occur, the degree to which it would and the power to reverse the shift would continue to remain with Congress. In that fact would probably lie the basis to reject the argument as too formalistic."

Any final resolution of constitutionality will rest in the courts, as it rightfully should. However, we cannot help but be influenced by the opinion of Mr. Killian who is recognized as one of the country's premier constitutional scholars.

ANTICIPATED BENEFITS

We strongly disagree with the argument advanced by some opponents of the legislation that the item veto could only be applied against a relatively small percentage of the Federal budget. Such a view assumes, (correctly) that the item veto could not be applied against the so-called entitlement spending programs and assumes (incorrectly) that it would not be applied against items in the defense budget.

This argument presupposes that the item veto is useless unless a specific level of savings can be demonstrated as resulting from its use. But there is no minimal level of savings that must be "guaranteed" from use of the line item veto for it be viewed as a useful tool for controlling Federal spending. In fact, we tend to the view of Alexander Hamilton, who, writing in the Federalist Papers, pointed out that much of the value of the President's veto rested in its "anticipated" benefits—those benefits that accrue from anticipation of the possible use of the veto and the resultant self-control that this imposes on the legislature and on the legislators. Those benefits are impossible to quantify, so we must caution our colleagues against setting specific "savings" goals for this legislation as a baseline against which to measure its effectivensss.

With item veto authority, a President would be able to excise those specific spending items in defense, as in any other area that do not meet with his approval. He would no longer have to accept the good with the bad in every appropriation bill.

Some of our colleagues point to the President's existing rescission authority and assert that this power negates the need for a line

item veto. We disagree, because we have examined how the rescission process has worked since its inception in 1974. It simply has not had a major impact on restraining Federal spending.

Further, there is a critical difference between rescission authority as it now exists and line item veto authority. In order for any proposed rescission savings to be realized, both Houses of Congress must approve the proposal by a majority vote. Savings achieved through use of the line item veto would be achieved unless the veto is disapproved by a two-thirds vote of each House. The line item veto rightfully "tilts" towards savings not spending. That is an important difference.

In response to the alarms that have been raised by opponents of the legislation that its passage would represent an enormous shift of power to the President, we would point out that until 1974, the President, as a result of congressional action, had wielded virtual unilateral impoundment authority. That power was far greater than any that would be granted to the President under the terms of S. 43.

HOW THE PROPOSAL WORKS

S. 43 provides that each "item" of any appropriation bill shall be enrolled as a separate bill for presentation to the President. The President would then be able to sign or veto separate pieces of legislation. Any vetoed "item" would have to be returned, along with the President's objections, to the House in which it originated. As mandated in the Constitution, any vetoed measure could be overridden by a two-thirds vote of each House.

The legislation defines "item" as any and all paragraphs and numbered sections contained in appropriation bills. The legislation contains a "sunset" provision under which the line item veto authority will expire in two years unless specifically renewed by Congress.

This last provision is important. We do not pretend to be able to answer categorically at this time every question that has been raised about the effect this legislation would have on the appropriation process, on Federal spending levels, or on the equilibrium that exists between the executive and legislative branches.

However, if we take the view that nothing can be done unless or until every conceivable worry and objection has been resolved, we forfeit our responsibility as legislators. The automatic sunset provision gives us an insurance policy against the event that this form of the line item veto is misused, or if circumstances arise that make it clear it is not performing the functions it was designed to serve.

AN APPROPRIATE CHANGE

Caution is appropriate whenever institutional change is undertaken. We believe, however, that there is a significant difference between a rational caution and the kind of paralysis that results from an unwillingness to consider novel solutions to very serious problems.

There now exists within the Congress an institutional bias that mades it easier and more profitable politically to spend the taxpay-

ers dollar than to save it. Unfortunately, special interest pleading carefully aimed at elected officials seems to elicit a better response in Congress than does the generalized, diffuse desire on the part of the electorate for reduced Federal spending and lower deficits. This proposal will help eliminate the resulting bias toward higher levels of spending.

We do not contend that President Reagan, or any other President, has a greater concern than Members of Congress do for our Nation's economic health and general welfare. But it is true that only the Chief Executive is elected by the entire Nation, is responsible to a national constituency, and is free from the district, State or regional considerations with which every Member of Congress must contend.

The Founding Fathers recognized this by giving the Chief Executive a major role to play in the legislative process. Professor Judith Best, distinguished teaching professor of political science at State University of New York at Cortland, has written,

> There are many practical agruments for the item veto, but the compelling argument is constitutional principle. It is fidelity to the separation of powers with its checks and balances.

Professor Best quotes Alexander Hamilton, who wrote almost two hundred years ago in Federalist Paper No. 71,

> The tendency of the legislative authority to absorb every other has been fully displayed and illustrated in governments purely republican, this tendency is almost irresistable. The representative of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity.

Those comments have worn well; they have as much or more relevance in the late twentieth century as they had when they were written in the late eighteenth.

We submit for the review and consideration of our colleagues the monograph that Professor Best prepared on S. 43 and which she has provided to the author of the legislation, Senator Mack Mattingly.

STATE UNIVERSITY COLLEGE AT CORTLAND,
DEPARTMENT OF POLITICAL SCIENCE,
Cortland, NY, January 30, 1985.

Senator MACK MATTINGLY
U.S. Senate
Washington, DC.

DEAR SENATOR MATTINGLY: After a careful examination of your proposal to give the President a two-year statutory line item veto authority over appropriations bill, I write to express my support. It is my considered judgment, as expressed in my article, "The Item Veto: Would The Founders Approve?" Presidential Studies Quar-

terly, Spring 1984, that the item veto is necessary to restore the balance of power between the legislature and the executive that the Founders deemed essential for good government. Although I would prefer a constitutional amendment, I support this bill as an experiment and a first step for I respect the concerns of those wary of constitutional change. I wholehearted agree that constitutional amendments should not be made lightly and that the burden of proof lies with those proposing constitutional amendments.

In the process of forming my judgment on your proposal, I have reviewed the literature and weighed and considered the several objections to the proposal. I conclude that your proposal meets the raised objections, constitutional, political, practical and ministerial, either fully or on balance. I have considered each of these objections separately and formulated a response, which I have attached. Please feel free to use any of these thoughts you find cogent.

Three simple statements of fact have a bearing on the item veto: 1. The veto was created by the Founders to be an internal control on government. 2. Congress has eroded the veto power. 3. Government spending is out of control. While the item veto is not the only or the sufficient solution to the problem of government spending, it is a solution to the imbalance of power. To be the sufficient solution to the imbalance of power, it would have to take the form of a constitutional amendment. What Congress can give, Congress can take away.

A statutory item veto authority may be justified on practical political grounds, but is must also overcome that objection which has proven fatal to previously made statutory proposals—their unconstitutionality. In my judgment your proposal is constitutional for it does not change the requirement of presentment to the President or the provisions for reconsideration and override, and it is based on the congressional power, implicit in Article I, Section 5, to define a bill.

There are many practical arguments for the item veto, but the compelling arguments is constitutional principle. It is fidelity to the separation of powers with its checks and balances. As Hamilton said, in Federalist 71, without the checks and balances, "such a separation must be merely nominal, and incapable of producing the ends for which it was established." The foremost, though not the exclusive, end was to prevent legislative dominance, as is clear from Hamilton's elaboration:

"It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other has been fully displayed and illustrated. . . . In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity."

Hamilton may not have been foresighted enough to predict the specific means of encroachment, that Congress would abuse its power to define a bill in order to encroach on the veto power, but he did foresee the general tendency. Indeed, on reading his last sentence above, one would think that he had actually overheard the objections to the item veto reform made by a few of our representatives—so aptly does he describe them.

The veto is an indispensable check and balance, and the Founders intended that it be frequently and forcefully used as an essential internal control on government. The Founders saw in the veto the means of providing the benefits of reconsideration and anticipation. Abusing its power to define a bill, Congress has trespassed. Having transgressed, will it rectify? The more cynical analysts may believe that this proposal has the same prospect of passage as the fox locking the chicken coop, but I do not share this view. Political Scientists teach their students that there are two theories of representation: the delegates, who is the faithful representative of his small part of the whole, of the special, narrow, local interests of his particular constituents, and the trustee, who, knowing that the whole is greater than any of the parts or even their sum, acts for the good of the whole. Which, the students ask, is the model followed by our representatives? The answer, I believe, is both—as the situation requires. On occasion a policy that transcends the clash of special interests and institutional jealousy of power is needed. On such occasions many of our delegate representatives are capable of being trustees. This proposal is such an occasion. It is an opportunity to revitalize one of our constitutional checks and balances; it is an opportunity for statesmanship.

It is possible for our representatives to be statesmen; it is possible because it must be possible if men are capable of self-government. The fundamental policy of "supplying by opposite and rival interests the defect of better motives" is a prudent and necessary policy, but there are times when there is no substitute for "better motives". The establishment of the policy is the work of Founders, of men who in creating it, transcended it. That policy could only be created by men of "better motives". It can only be recreated by men of "better motives".

Since I believe your proposal is a first step in reanimating the Founders' fundamental policy of government, I not only support your proposal, I honor the commitment that you and your colleagues in this endeavor have to be our fundamental constitutional principles.

Sincerely,

JUDITH A. BEST,
Distinguished Teaching Professor,
Political Science.

OBJECTIONS TO THE LINE ITEM VETO CONSIDERED

(Prepared by Judith A. Best, Distinguished Teaching Professor, Political Science, SUNY at Cortland)

THE CONSTITUTIONAL OBJECTION

The objection is that the proposal is unconstitutional because it would change the Constitution, specifically the veto power, by act of Congress alone.

The response is as follows: Article I, Section 5 of the Constitution permits this procedure. Nothing in Article I, Section 7 is violated by this procedure. Under this proposal, all bills must be preesnted to the President. He may sign or veto all bills. He must return vetoed bills with his objections. Congress may override any veto with a two-thirds majority of each House.

Under Article I, Section 5, Congress possesses the power to define a bill. Congress certainly believes that it possesses this power since it and it alone has been doing so since the first bill was presented to the first President in the first Congress. If this construction of Article I, Section 5 is correct, the definition of a bill is a political question and not justiciable."Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr,* 369 U.S. 186 (1962). "A textually demonstrable constitutional commitment" of the issue to the legislature is found in "Each House may determine the Rules of its Proceedings." If Congress may define as a bill a package of distinct programs and unrelated items, it can define distinct programs and unrelated items to be separate bills. Either Congress has the right to define a bill or it does not. Either this proposal is constitutional or the recent practice of Congress in forming omnibus bills containing unrelated programs and ungermane items is constitutionally challengeable. If the latter, the President would be well advised to bring such suit against the next omnibus bill.

THE IMBALANCE OF POWER—IMPERIAL PRESIDENCY OBJECTION

The objection is that the proposal would create an imbalance of power, concentrating more power in the executive thus leading to an imperial Presidency.

The response is as follows: The imbalance already exists and the proposal is an attempt to restore the original equilibrium. This objection appears to be compelling because it invokes a principle convincing to both the theoretical and the practical reason. The good once attained, innovations must be retrogressions or once you're at the top, any movement must be downward. A proper balance of powers once established, any change must destroy the balance. The logic of this argument, however, is not convincing because it is based on the incorrect factual assertion that no

charge has yet occurred. The fact is that the balance of power has already been disturbed by Congressional practice, by encroachment on the veto. The proposal is not an innovation, but a restoration.

The objection is unwarrented if not absurd because an imperial President has an absolute veto not a qualified one. Congress would still have the power to override any Presidential veto. The objection is invalid because this proposal is limited to appropriations bills and has a two year sunset provision. The very existence of this line item veto would depend upon simple majorities in each House of Congress. What Congress can give, Congress can take away. A more valid objection to this proposal is that it gives too little, not that it gives too much.

Although the less than charitable might describe this objection as the pot calling the kettle black, for it is Congress that has managed to encroach on the veto power through such things as riders, non-germane amendments, and pork-barrel provisions in omnibus bills, nonetheless, the balance of power objection is on its face so serious that it deserves a respectful hearing and the strongest possible rebuttal.

Much of the opposition to the line item veto is based on jealousy of institutional prerogative, and this jealousy is usally a good thing. A "prudent jealousy," Madison said, is "the first duty of Citizens," and is one of the effectual "personal motives" the Founders decided to employ to "resist encroachments" on the separation of powers. Jealousy of institutional prerogative is desirable and necessary to preserve our balanced system of government. But, prerogative means prerogative and not license. The constitutional prerogative, the exclusive and unquestionable right of Congress, is to pass or to refuse to pass bills and resolutions and to override presidential vetoes by two-thirds votes. Congress has no prerogative to exclude the President from the legislative process or to debilitate the veto.

Opponents charge that with the item veto, "the President can frustrate a decision of the Congress on any individual program." (Hatfield, S13446, Oct. 4, 1984) Yes, indeed. Exactly so. To frustrate, to check, to thwart the decision of ordinary majorities of Congress and thus provide the benefits of reconsideration is precisely what the veto is for. The logic of this objection would support a Congress that produced just one bill each session, a Congress that lumped all bills into one grand all-encompassing measure, thus giving the President but one opportunity to veto, to take all or nothing. This objection is not merely an objection to the item veto, it is an objection to the veto itself, to the veto as it was created and intended to operate. Either the opponents do not understand, or they do not agree with the Founders concept of the separation of powers. Under the separation of powers, Congress was not given the plenary power to legislate. The legislative power was divided, and one-sixth of it was given to the President (one-sixth being the difference between an ordinary majority

and a two-thirds majority). That one-sixth of the legislative power is the President's prerogative, his exclusive and unquestionable right.

In terms of legislation, Congress was given the first word and the last word, not the only word, not the unimpeded, unfrustrated word. Congress alone can initiate the lawmaking process by passing a bill. The President cannot initiate a bill. Congress has the last word because it can override a veto. The President does not have an absolute veto. But in between, the President was given the power to frustrate, to check, to thwart. The reason why is most succinctly stated in "Memorial and Remonstrance" where Madison asserted, "The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people." The "great Barrier" is limited government, government with internal controls, with the checks and balances that enforce the "policy of supplying by opposite and rival interests, the defect of better motives."

The "new science of government" that our Founders believed made democratic republics viable was a science of process. In a government of laws and not of men, in a free government of, for and by a huge and heterogeneous people, the highest morality is, as the great constitutional scholar, Alexander Bickel, said, "the morality of process." Men, who cannot and do not agree on such substantive issues as abortion, school prayer, the nuclear freeze or even various appropriations, can and must still agree on the process by which such decisions are to be made. In a continental country with such a wide variety of religious, ethnic, occupational, racial and social interests, the general will, what all can will, is our constitutional forms and procedures. In any contest or dispute among free and civilized men, the rule of law, the rules that govern the contest are the sine qua non. It is the faith of the democratic-republican that if we follow the constitutional process the public good will emerge.

To violate the process, to defeat or finesse the rules, to disregard the ordained form is to destroy the "great Barrier which defends the rights of the people." That form and process are fundamental can be seen in the great battle cry of our revolution: Taxation without representation is tyranny! Not taxation is tyranny, but taxation that emerges from a defective procedure is tyranny. According to our Founders, the qualified Presidential veto is part of the correct process. Any legislative practices that finesse the veto, that avoid subjection to the full force of the veto, violate the morality of process. If the form is wrong, if the procedure is defective, the law is tyrannical. Legislative practices, particularly in appropriations bills, do debilitate the veto. Restoration is imperative.

THE PASSING THE BUCK OBJECTION

The objection is that the proposal would decrease responsibility in Congress because Congress could abandon restraint altogether and evade difficult decisions by passing almost everything and leaving it to the President to make the hard choices.

The response is as follows: The proposal will increase the responsibility of Congress because it will mitigate that pernicious form of reciprocity—I'll vote for your pork, for your special interest, if you'll vote for mine—because the payoff for such log-rolling will be much more doubtful. Without the coercive effect of the omnibus bill, the President can scuttle the deal, nullify the bargain. He might well find that one of the items in the trade off is more rational than the other; he might even find that one is in the national interest and the other a mere venality. The incentive for sordid bargaining decreases if the Presdent can undo such bargains in whole or in part.

The Founders asked the common sense question: are men more likely to be responsible when they believe someone can say no to them, or when for all practical purposes they believe no one can? It is clear their answer was the former. Part of the purpose of the veto power is to provide the benefits of anticipation, benefits that have been largely lost because of the omnibus bill. Though anticipation of a veto may and probably will tempt some to abandon restraint altogether, the Founders believed that it would increase the restraint of most. Here institutional pride and jealousy of departmental power and reputation also play a role. When the President vetoes, he must give his reasons so that Congress may reconsider and possibly override his veto. Those reasons are part of the public record. A Congress that flagrantly abdicated its responsibility would be subject to public censure and shame. A Congress that made a practice of hiding behind the President would not escape the notice of the media and the wrath of the people.

The passing the buck objection is based in part on a confusion of ends and means and in part on a policy that is contrary to the policy of the Founders. First, it is highly desirable that our elected representatives be responsible, but that responsibility is merely part of the means and not the end of government. Service in government is far more than a school in character development for elected representatives. That the office can contribute to the making of the man, that the awesome duty of office may and sometimes does improve a man's character cannot be denied, but the opposite is also possible. Some degree of virtue in our representatives is necessary, and that virtue, that responsibility is promoted in a number of ways, most notably by free and frequent elections and a free press to publicize failures of responsibility. The assumption is that the people will choose responsible men in the first place, and remove those who do not measure up. Let us be careful not

to confuse ends and means, and let us remember that the final purpose of government is not to develop the virtue of the leaders, but to secure the safety of the people.

Second, although the policy of seeking and depending upon virtue in governing officials is part of a long and honorable tradition, and the Founders did not totally abandon it, yet it was not their central policy. To place sole reliance on responsibility, to place sole reliance on virtue itself, was, to the Founders, the height of imprudence. Their policy was the policy of "opposite and rival interests." Their policy was the separation of powers and the checks and balances. The whole weight of history was on their side. Reliance on virtue had been tried, and it failed to provide safety.

Finally, the pass the buck argument is an argument that in principle applies not just to the item veto proposal but to the veto itself and thus is in opposition to the Founders' policy. Surely the legislature would find it harder to evade responsibility if the Constitution permitted no veto at all. The very existence of the veto power already allows some passing of the buck. Responsibility is a fine quality, and we are right to expect it of all our elected officials, but safety comes first. The people must be protected from bad laws and errors. That protection lies in the checks and balances, that protection lies in a frequently and forcefully used veto power that can be overridden by a two-thirds vote of each House of Congress. The Founders were not about to issue blank checks to any man. It is just too dangerous. Increased responsibility or increased safety? The Founders' answer is safety, for they understood that basic axiom of political science: ruling—law-giving—is for the safety of the ruled, not for the interest, advantage or even the virtue of the rulers.

THE IRRESPONSIBLE PRESIDENT OBJECTION

The objection is that the proposal could permit a President to use the item veto to punish political opponents and uncooperative members of his own party, and to further his personal or ideological interests.

The response is as follows: The proposal contains sufficient safeguards against the abuse of power. First, the sunset provision in this proposal obviates this objection. Such behavior on the part of the President would guarantee the end of the line item veto, and the President would be fully aware of this fact. Second, the two-thirds override of a veto provision in the Constitution was created to forestall and counter just such a danger. The Founders believed that this provision alone sufficed. Such actions on the part of the President would be perceived by members of both parties as attacks on the independence of Congress, and men of both parties would stand together to resist the President. They have already done so in the past. Institutional loyalty and jealousy of power and prerogative are

fundamental norms of the Congress. Third, such an abuse of power by the President could not escape the notice of the media and the wrath of the people. The President would be held to public censure and shame. History demonstrates that the people will not support presidential attacks on the separation of powers whether those attacks take the form of purging or packing. When the people are aroused, Congress is not reluctant to censure or even to bring impeachment proceedings against the President.

THE INSIGNIFICANT SAVINGS OBJECTION

The objection is that the proposal would not achieve meaningful reductions in the Federal deficit because it cannot be applied to such expenditures as entitlement programs or interest on the national debt.

The response is as follows: The objection is a strawman since no one claims that it is a panacea. It is a beginning, a good faith effort to respond to a serious problem and the will of the people. It should and must be followed by other proposals for strengthening the budget process and reducing the deficit. "Every great journey begins with a single step."

The objection is itself a symptom of the disease. Perhaps to some who are used to thinking of budget items in the billions, budgets in the hundreds of billions and deficits in the trillions, several billion dollars in annual savings is a mere drop in the bucket, but to the man on the street even a billion dollars is a very great deal. If a few billion dollars in savings makes no difference, then a few extra billion in expenditures makes no difference either. It is thus that trillion dollar deficits are built.

THE IMPERIAL CLERK OBJECTION

The objection is that the proposal would create an imperial enrolling clerk with the discretion to determine what constitutes a bill and thereby undo or distort the will of the Congress.

The response is as follows: The Congress and each chamber thereof will still control the format. The clerks are employees of the chambers, hired and fired by the chambers, subject to the will and commands of the chambers. The task assigned to the clerks is purely ministerial.

A more cogent objection to this proposal is precisely that Congress would still control the format and could subvert the intention and make the item veto meaningless by drafting an omnibus bill in "one section or one unnumbered paragraph." Senator Baker made this very point in 1984.

THE PARTISAN OBJECTION

The objection is that the bill creates a partisan advantage.

The response is as follows: The issue is not a partisan one because for every pet project of the Democratic party open to a line item veto by a Republican President, there is a pet project of the Republican party open to a line item veto by a Democratic President. Although the proposal has a two year sunset provision, the proposal is made with the clear intention of renewing and institutionalizing it if it passes the test of experience.

One important variation of this objection is that a Democratic or liberal President could veto items in defense appropriations passed by Congress. The special status of this argument arises from the national government's exclusive responsibility for defense. Most other domestic items vetoed by a President could be funded by the individual states, but no state could fund a national defense project.

The response to this is as follows: Neither party has a monopoly of concern for the survival of the country. Neither department of government, neither the Congress nor the President, has a claim to unchallengeable judgment about what is needed for defense. If one party is derelict in its duty to the national defense, the proper solution lies in the ballot box, not encroachment on the checks and balances. If one department is derelict in its duty to the national defense, the proper solutions lies in the checks and balances, the vigorous revitalized veto and the possible override by Congress.

Conservatives and the Item Veto: A Reply to Congressman Mickey Edwards

In his article, "A Conservative's Case Against The Item Veto," Washington Post, February 8, 1984, Congressman Mickey Edwards makes his case against the line item veto for the President, saying that it is a conservative's case, and chastising his fellow conservatives for supporting a proposal that he believes is incompatible with their philosophical principles. While he invokes old American political principles, he misapplies and misunderstands those principles, and therefore, I believe his case ultimately fails.

When it comes to constitutional issues such as the separation of powers and the checks and balances, let us fervently hope that we are all conservatives as we are all liberals. Our Constitution was established on the classically liberal principles that just government rests on the consent of the governed and protects the natural rights of men. The Constitution is undeniably a classically liberal document. A conservative, as I understand the term, is one who desires to preserve the established order, in this American context, the constitutional order designed and ordained by the Founders. The perpetuation of our political institutions, therefore, requires that all true American liberals must also be conservatives, and all American con-

servatives must also be true liberals. The principles that American conservatives desire to preserve are liberal principles.

Mr. Edwards argues from the fundamental American principle of the diffusion of power. He attacks both concentration of power and change. He argues that "the harder it is to write and rewrite laws, the greater the protection for the people." These ideas and principles are clearly conservative, are clearly reflective of the Founder's views, and yet they are perversely applied against the item veto. The item veto would make it "harder" to write and pass laws, and in all likelihood make it necessary to rewrite them more often. The item veto would reduce the concentration of power in the legislature by revitalizing the veto power. If Mr. Edwards believes, as he says, "Difficulty in bringing about change is again a cardinal virtue," then it would follow that he would support a proposal on the item veto because it is more difficult to muster a two-thirds majority in each chamber than an ordinary one. The argument does not make sense unless the term change refers only to an alteration and reduction in the power of Congress to avoid and finesse the veto. The change he fears is not change in the laws per se but rather change in the current law-making process, a process in which Congress now presents the President with all or nothing choices, a process which has warped and weakened the veto depriving it of the vigor the Founders desired. That this is indeed the case is indicated by his explication of the central philosophy of conservatism.

Mr. Edwards argues that opposition to the concentration of power "is the single philosophical element" which units all conservatives of the American tradition. He is right, but he tends to find the danger of concentration only in the Presidency. In this he differs markedly from the Founders and from Madison in particular. For our Founders, a concentration of power in the hands "of one, a few, or many," was to be feared and resisted. (Federalist 47). Mr. Edwards believes that because Congressional power is in the hands of many rather than one, it is less dangerous. The Founders would not agree. The many, when they unite, when they act in concert, when they engage in such practices as logrolling, can be as dangerous and tyrannical as one man. Mr. Edwards may believe that in principle the legislature is the least dangerous branch of government, but that view was definitely not the view of the Founders. The Founders feared legislative dominance, and because they did, they divided the legislature into two chambers. They did not divide the executive. Indeed, they exerted themselves to create a strong, vigorous and independent executive.

This is not to say that they saw no danger in executive power, for they did, and they took steps to avert the danger. Rather, it is to say, as did Madison in Federalist 51, that, "In republican government, the legislative au-

thority necessarily predominates." He concludes that the first remedy for this dangerous imbalance is bicameralism and different modes of election to each chamber. But, even this, he says, is not enough, for the "weakness of the executive" requires further fortification, that fortification is the veto power. According to our Founders, it is not the veto power that is to be feared, but its absence and its debilitation.

As I have argued elsewhere, the Founders intended that the veto be frequently and forcefully used, not only to prevent bad laws and errors, but to institutionalize the benefits of reconsideration and to produce that anticipation which brings self-control. If the Founders were with us today and saw the extent to which Congress has encroached on the veto power with its omnibus bills filled with riders, non-germane items and pork barrel, they would support proposals to rehabilitate the veto power.

Mr. Edwards' case is conservative, if to be a conservative means the desire to preserve any existing power relationship or any current practice however debased or decayed. In such a case even successful radicals must be called conservative since they too wish to preserve the changes they have brought about. It seems to me that the true conservative, in fact the true statesman, is the man who works to preserve, to renew, to recover and to restore the balance established in our original constitutional solar system.—Judith A. Best, Distinguished Teaching Professor, Political Science Department, SUNY at Cortland.

CONGRESS RETAINS CONTROL

We have seen S. 43 attacked on the grounds that it would grant vast authority to unelected enrolling clerks in the House and Senate; that it would enable administrative functionaries to become de facto legislators. This criticism is specious. The clerks would be granted no new authority under this proposal. They would remain bound by the limits of statute, precedent, and rule that now guide their actions. The individual sections and paragraphs that would be enrolled and sent to the President as separate pieces of legislation under this proposal would ge part of an appropriation bill only if the Congress had put them there. The specific wording and content of each of those items would be determined by the Congress and its committees during consideration of the legislation. The clerks would have no authority to add anything to or delete anything from the legislation that had been approved by Congress and which they would prepare for presentation to the President.

A more serious consideration is the question that has been raised about the possible consequences to our national defense from an injudicious use of the item veto on a defense appropriation bill. Could a President, supported by a minority of one-third plus one of the membership in only one House of Congress, impede the ability of the National Government to carry out its responsibilities to provide for the national defense?

After giving the matter considerable thought, we conclude that it would be nearly impossible to do so. While there are always disputes about particular programs and expenditures, there exists in our Nation a broad, general agreement on the minimum requirements for national security. While a President, supported by a small minority in Congress, could possibly halt or delay a particular program or expenditure for a limited period of time, it must be recognized that his supporters in Congress would have to face the electorate and be prepared to defend their actions. Congress itself would be able to respond to such a situation because the majority in each House would control the content of legislation passed in each House. Any blatant irresponsibility by the Chief Executive would invite retalitory action by the Congress. The automatic sunset provision of this legislation makes the proposal a two-year test, giving us further protection against any overreaching by the Chief Executive.

We conclude that this legislation represents an innovative and bold attempt to begin the critically needed task of reforming the institutional arrangements that perpetuate a comfortable, and politically profitable, status quo.

We strongly urge our Senate colleagues to join us in supporting this legislation and beginning the important job of reorienting congressional spending habits so that they serve the public's interest and not the special interests.

BOB DOLE.
JOHN WARNER.
JAKE GARN.

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